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ADMINISTRATIVE LAW

*S S Jaswal**

I INTRODUCTION

A GOVERNMENT OF the people, by the people, and for the people must be accountable to its people. However, this policy is not absolute. Here both approaches represent opposite ends, yet significant to the functioning of public laws. Therefore, in order to balance these competing interests, the role of administrative law gains greater significance.[1] It ensures adoption of general principles of legality and fair play; necessary for securing equity and inclusiveness in the functioning of the state.[2]

The present survey deals with the cases decided by the Supreme Court of India during the year 2019 relating to administrative law. The various topics covered in this survey have been analyzed under appropriate heads, thereby revealing the current development in the field of administrative law in India. The extent of development reflects, at least partly, the principles of fairness and accountability in the work of administrative agencies.

II CLASSIFICATION OF FUNCTIONS

In administrative law, characterization of the function discharged by the administration as administrative or quasi-judicial leads to significant consequences.Primary test for classifying an action as quasi-judicial is whether the authority has statutory power to act judicially in arriving at a decision. In this regard, courts have laid down principles to characterize the function of an authority and in fact have categorically expressed that when a statute prescribes a particular body to exercise a power, it must be exercised only by that body. In so far wherein the case for sub delegation is made then the sub-delegated authority is required to function within the specific terms or permitted norms it is authorized to perform its functions.

The role of authorities forming part of committees of government in the functioning of state plays an important role. In this regard the authorities are required to properly discharge their duties. It is for this reason the Directive Principles of the State Policy have been left out of the purview of the courts. This in fact ensures state

* Registrar, Himachal Pradesh National Law University, Shimla. The author acknowledges the research assistance provided by Naveen Chandra Sharma, Advocate High Court of Delhi and Prakash Sharma, Assistant Professor, VSLLS, VIPS, New Delhi.

1 *See* SS Jaswal, "Administrative Law" LII *ASIL* 1 (2016).

2 *See* SS Jaswal, "Administrative Law" LI ASIL 1 (2015).

governments to have full freedom to implement schemes in the manner it so desires and the courts may not become the hurdle in implementing the schemes. However, the schemes cannot be permitted to remain dead letter as futility of such schemes is injurious to the very rule of law and can create anarchy. When schemes have been framed, they are to be implemented.The apex court in *M.C. Mehta* v. *Union of India*,[3] is of the view that punishing farmers will not yield the desired results (in order to curb air pollution), however lack of inaction on part of officers and governments must not escape unnoticed and they must face legal action for escaping from their responsibility and liability.

Separation of powers

The doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the state. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. It is understood that the functioning of democracy depends upon the strength and independence of each of its organs. However, situation arises wherein the court does not accept the legislative and specific provisions of law passed by the legislature. In such a situation two possible contradictory scenarios emerge namely (i) legislature can use amending power, and (ii) if court finds provisions as not acceptable, it can strike them down (being violative of fundamental rights or in case of deficiency to point out to the legislature to correct the same).

The Supreme Court in *Union of India* v. *State of Maharashtra,*[4] used its review power to clarify the above-mentioned position.The apex court while reviewing its earlier judgment[5] dealing with the provisions of Scheduled Castes and the Scheduled

3 MANU/SC/1620/2019.

4 AIR 2019 SC 4917.

5 *Subhash Kashinath Mahajan* v. *The State of Maharashtra*, AIR 2018 SC 1498. The court made following directions, namely:

(i) Proceedings in the present case are clear abuse of process of court and are quashed.

(ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in *Pankaj D Suthar* and *N.T. Desai* and clarify the judgments of this Court in *Balothia* and *Manju Devi*;

(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

(iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

(v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

Tribes (Prevention of Atrocities) Act, 1989,made its observation that the position of Scheduled Castes and Scheduled Tribes being special in nature demands special protection.Any failure to take note of this aspect would have a significant bearing to their protected interest of social justice. While allowing the review, the apex court recalled its earlier direction nos. (iii), (iv) and (v).

In *Prakash Singh* v. *Union of India*,[6] a correction or modification to the earlier judgment made in *Prakash Singh* v. *Union of India,*[7] was sought. The apex court rightfully rejected to express any opinion on the issue (as it would amount to pre-judging the issues). The court being mindful of the objectives sought, opined that whether the provisions of the Punjab Police Act, 2007, and the amending Act being contrary to the direction made in the 2006 judgment, are part of the different petition and therefore the same is required to be appropriately dealt.

Rule of law

Rule of law is the bedrock of democracy. However, firmly entrenched the principle may be, it gets tested in a myriad of situations that confronts the courts from time to time. On October 23, 2018, the Central Vigilance Commission (CVC) passed an order under section 8(1) (a) and 8(1) (b) of the Central Vigilance Commission Act, 2003 read with section 4(1) of the Delhi Special Police Establishment Act, 1946 (Act, 1946) divesting Director, Central Bureau of Investigation (CBI) of the powers, functions, duties, supervisory role, *etc*. vested in him as the Director of the CBI. On the same date, two order came from the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training. One for divesting the power and the second conferring upon the Joint Director, CBI to look after the duties and functions of Director, CBI with immediate effect. The legality, validity and correctness of these three orders were challenged in *Alok Kumar Verma* v. *Union of India*.[8] The apex court while setting aside the three orders, constituted a committee under section 4A(1) of the Act, 1946, which may be so done at the earliest and, in any case, within a week from the date of the order. The court the reinstated the petitioner and held that he will cease and desist from taking any major policy decisions till the decision of the committee permitting such actions and decisions becomes available within the time frame indicated.

Rule of law comprises not only of the principles of natural justice but also provides that the procedure prescribed by law must be followed. Rule of law also envisages that illegal constructions which are constructed in violation of law must be demolished and there can be no sympathy towards those who violate law. In *Municipal Corporation of Greater Mumbai* v. *Sunbeam High Tech Developers Private Ltd.*[9] The issue was: if a municipal corporation demolishes a structure in exercise of powers vested in it but in violation of the procedure prescribed, can the high court direct the 'owner/occupier' of the building to reconstruct the demolished structure? The apex

6 (2019) 4 SCC 6.
7 (2006) 8 SCC 1.
8 AIR 2019 SC 438.
9 AIR 2019 SC 5435.

court in of the opinion that when the exercise of the power of demolition, which affects the property of the citizens is done, it must be exercised in an absolutely fair and transparent manner. Rules in this regard must be followed. Having said this, the apex court disapproved the practice followed wherein illegal structure is permitted to be re-erected. In this regard the court said that:[10]

> …if the demolition was carried out without giving the second notice, why should the party who has violated the law by raising the construction without obtaining permission be permitted to raise another illegal structure which only has to be razed to the ground, after following the procedure prescribed by law? Why should the Nation's wealth be misutilised and misused for raising an illegal construction which eventually has to be demolished?

Disapproving of such a practice, the court opined that such blanket orders of re-erection leads to unplanned and haphazard construction, and therefore liability must be sought as against the concerned authority for such approval. In this regard, the court observed thus:[11]

> …we do not approve the action of the Municipal Corporation or its officials in demolishing the structures without following the procedure prescribed by law, but the relief which has to be given must be in accordance with law and not violative of the law. If a structure is an illegal structure, even though it has been demolished illegally, such a structure should not be permitted to come up again. If the Municipal Corporation violates the procedure while demolishing the building but the structure is totally illegal, some compensation can be awarded and, in all cases where such compensation is awarded the same should invariably be recovered from the officers who have acted in violation of law.

Independence of judiciary

Article 235 of the Indian Constitution vests control of the subordinate courts upon the high courts. As the high court exercise disciplinary powers over the subordinate courts, they are also required to act as the protectors and guardians of the judges falling within their administrative control. To err is human and the apex court had time and again laid down the criteria on which actions should be taken against judicial officers.[12] The apex court has even cautioned the high courts that action should not be taken against judicial officers only because wrong orders are passed.[13] Similar issue arise in *Krishna Prasad Verma (D) through L.Rs* v. *State of Bihar*,[14] wherein the

10 *Id*., para 15.

11 *Id*., para 16.

12 *See Ishwar Chand Jain* v. *High Court of Punjab & Haryana* (1988) 3 SCC 370; *Union of India* v. *A.N. Saxena* (1992) 3 SCC 124; *Union of India* v. *K.K. Dhawan* (1993) 2 SCC 56 and *P.C. Joshi* v. *State of Uttar Pradesh* (2001) 6 SCC 491

13 *See Ramesh Chander Singh* v. *High Court of Allahabad* (2007) 4 SCC 247.

14 AIR 2019 SC 4852.

appellant gave 18 adjournments for production of the witnesses to the prosecution in the NDPS case. While allowing the appeal and setting aside the orders passed by the high court, the apex court explained the position of such a judicial officer (as between devil and the deep sea). The court opined thus:[15]

> If he keeps on granting adjournments then the High Court will take action against him on the ground that he does not dispose of his cases efficiently and if he closes the evidence then the High Court will take action on the ground that he has let the accused go scot-free. That is not the purpose of Article 235 of the Constitution of India.

In another matter,[16] the allegation was that the appellant judicial officer had a proximate relationship with a lady lawyer and due to this relationship, he passed certain judicial orders in favour of her clients, including her mother and brother when they were parties to certain proceedings. Those findings of fact have been upheld by all courts. The apex court while rejecting the appeal held that:[17]

> …A Judge must be a person of impeccable integrity and unimpeachable independence….When a litigant enters the courtroom, he must feel secure that Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. …This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and Rule of law to survive, judicial system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartially and intellectual honesty.

III DELEGATED LEGISLATION

Delegated legislation or administrative rule making or subordinate legislation, functions on the basis of principle that it must not transgress the limits set out by the parent legislation.[18] There are hierarchy of legal norms that ought to be given special status while deciding a particular matter. In *Delhi Transport Corporation* v. *Balwan Singh*,[19] the relevant fact for determination of the issue was that the employees of the appellant were governed by the Central Civil Services (Pension) Rules, 1972 or by the Employees Contributory Provident Fund Scheme. In this regard the court opined that, the applicable hierarchy (Kelsen's Hierarchy of Legal Norms) would consist of "(a) The Constitution of India, (b) Statutory law, which may be either Parliamentary

15 *Id*., para 15.

16 *ShrirangYadavrao Waghmare* v. *The State of Maharashtra* (2019) 9 SCC 144.

17 *Id*., para 37.

18 *Supreme Court Employees' Welfare Assn*. v. *Union of India* (1989) 4 SCC 187.

19 2019 (3) SCALE 771.

law or law made by the State Legislature, (c) Delegated legislation which may be in the form of rules, regulations etc. made under the Act, and (d) Administrative instructions which may be in the form of Government orders, circulars etc."[20] On the careful perusal of facts of the present case the court opined that to avail of the benefit of pension rules, an employee must qualify in terms of the rules and since the pension rules came into force much later (though the intention was announced just before the VRS), the respondents are therefore governed by the Employees Contributory Provident Fund Scheme.

Further, a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy. In *Govt. (NCT of Delhi)* v. *Union of India*,[21] the issues were related to the status of National Capital Territory of Delhi (NCTD) and in, particular, about administration of NCTD, powers exercisable by and functions of the elected Government of NCTD (GNCTD) *vis-a-vis* the Central Government. The court opined that the Lieutenant Governor has been vested with the power to act in his own discretion in matters which fall outside the ambit and power of the legislative assembly and which have been delegated to him by the President as well as in regard to those matters where he is required under law to exercise his own discretion or to act in exercise of judicial or quasi-judicial functions. Rules for the conduct of business are framed by the President in relation to the NCTD, including for the allocation of business. They would include the procedure to be followed where there is a difference of opinion between the Lieutenant Governor and the council of ministers.

Further, it well settled that an order, if passed, is in the nature of delegated legislation, then it does not have to satisfy any rules of natural justice outside what is prescribed by or under the specific law.[22] This was followed in *63 Moons Technologies Ltd.* v. *Union of India*,[23] wherein writ petitions as to the applicability and construction of section 396 of the Companies Act, 1956 (Act, 1956), were raised. The court distinguished between an order which is legislative in nature and that which is administrative in nature, and held that there is complete non-application of mind by the authority assessing compensation to the rights and interests which the shareholders and creditors of the appellant have, especially following the letter and spirit of section 396(3) of the Act, 1956.

In fact, the words of a statute should be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. The concept has the potential to guide in interpreting the provisions related to delegated legislation. The apex court too adopted this concept in interpreting

20 *Id*., para 22.

21 2019 (3) SCALE 107.

22 *SeeK.I. Shephard* v. *Union of India* (1987) 4 SCC 431; *Prag Ice and Oil Mills* v. *Union of India* (1978) 3 SCC 459 and *Union of India* v. *Cynamide India Ltd.* (1987) 2 SCC 720.

23 2019 (7) SCALE 50.

Rule 105(1) read with the first proviso of the Delhi School Education Rules 1973 by invoking article 142 of the Indian Constitution.[24] In this case the respondent was continued as a probationer for nearly five years in contravention of rule. The apex court was of the view that a teacher who has spent five valuable years of her life and may now be overaged to get suitable employment elsewhere must not be left in the lurch, therefore relief can be extended even without deemed confirmation by an award of ex-gratia compensation.

As far as a delegated legislation or a notification issued under statutory powers is concerned, the challenge can be laid only in terms of well settled principles. Either the rule or notification is contrary to the provisions of the parent Act, or contrary to any provision of the Constitution, or brings about a conflict which is required to be resolved by the court. What about situation wherein the notification is not in exact conformity with the directions issued by the court? The apex court in *Dist. Collector, Satara* v. *Mangesh NivruttiKashid*,[25] opined that such a challenge would not be sustainable in view of the settled principles of examining such subordinate legislation/ statutory notifications. Meaning once the legislature lays down a legislative policy, and confers discretion upon the administrative agency for the execution of such policy, it is up to the agency to work out the details within the framework of the policy.

IV NATURAL JUSTICE

Also, it is equally well settled that the principles of natural justice must not be stretched too far. The apex court in *Chairman, Board of Mining Examination and Chief Inspector of Mines* v. *Ramjee* opined thus:[26]

> Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating.

Further, if the authority that takes the final decision acts mechanically and without applying its own mind, the order may be bad, but if the decision-making body, after fair and independent consideration, reaches a conclusion which tallies with the recommendations of the subordinate authority, there is no error in law. Recommendations are not binding but are merely raw material for consideration. In *St. John's College* v. *S. Wilson*,[27] the apex court while appreciating the facts and circumstances of the case, held that no useful purpose will be served by granting an opportunity of hearing to the appointments which were made in an illegal manner.

24 *Durgabai Deshmukh Memorial Sr. Sec. School* v. *J.A.J Vasu Sena* 2019 (11) SCALE 353.
25 (2019) 10 SCC 166.
26 (1977) 2 SCC 256.
27 2019 (1) SCALE 555.

The approach appears to be legally correct, especially when the totality of circumstances satisfy that the party visited with adverse order has not suffered from denial of reasonable opportunity. The rules of natural justice are not sacred scriptures and the denial in such a situation cannot be termed as punctilious or fanatical. Also, wherein no error was committed in the procedure prescribed under the scheme of rules or an opportunity to hearing had been afforded or the principles of natural justice had not been violated, it is not open for the courts to interfere in the disciplinary proceedings under its limited scope of review.[28]

Reflecting upon a sad reality these days, exclusion of justified and deserving candidates (for want of administrative defaults) is becoming a norm of the day. At the outset such selection process represents an unjust, unfair, arbitrary, and corrupt practices. However, the culprits either manages to escape the eye of law, and on other occasions due to ignorance or lack of proper mechanism never gets exposed. In *Pranav Verma* v. *The Registrar General of the High Court of Punjab and Haryana at Chandigarh*,[29] writ petitions were filed at the instance of more than 90 candidates challenging the entire selection process and evaluation method adopted in the main (written) Examination of Civil Judge in the Haryana Civil Service (Judicial Branch) Examination, 2017 and sought quashing of the result declared on April 11, 2019 along with the directions to get all the papers of the main exam of the petitioners to be re-evaluated by an independent expert committee. The petitions also demanded for the constitution of an independent judicial service commission for conducting examinations for selection of lower judicial officers. The apex court on the basis of report submitted by justice A.K. Sikri which suggested that the selection process was "*prima facie* faultless" and it was the evaluation process wherein fault was found.[30] The apex court to this extend followed the suggestions made by the report. Perhaps, it's high time to evolve a procedure to ensure uniformity *interse* the examiners so that the effect of examiner subjectivity or examiner variability is minimized.

A non-furnishing of the report amounts to violation of rules of natural justice, thus making the final order liable to challenge. In *State Bank of India* v. *Mohammad Badruddin*,[31] an appeal is made against an order passed by the high court in letters patent appeal, wherein the appellate authority altered the punishment of compulsory retirement in terms of rule 49(1) of the State Bank of India (Supervising Staff) Service Rules, 1992 to one of reversion to the post of junior management grade at the lowest stage. The division bench set aside the order of punishment on the ground that copy of the inquiry report was not supplied before the disciplinary authority passed an order of punishment, but was supplied along with the order of punishment. The court explained the position of article 311 of the Indian Constitution, post 42nd Amendment, and is of the view that the only requirement is to send a copy of inquiry report to meet

28 *Shashi Bhusan Prasad* v. *Inspector General Central Industrial Security Force*, AIR 2019 SC 3586.

29 2019 (17) SCALE 731.

30 *Id*., para 9.

31 2019 (9) SCALE 407.

the principle of natural justice. There is no mandatory requirement of communicating the proposed punishment. The court while allowing the appeal held that in a case where order of punishment has been set aside, the principles of natural justice warrant that the matter is remitted back to the disciplinary authority to conduct a proper hearing.

In *Union of India* v. *Udai Bhan Singh*,[32]an appeal arises from a judgment of a division bench of the High Court of Allahabad. While allowing the writ petition filed by the respondent raising a challenge to an order of the central administrative tribunal, the high court came to the conclusion that (i) there was a violation of the principles of natural justice in that the appellants failed to provide relevant documents to the respondent during the course of the departmental inquiry; and (ii) the inquiry was vitiated by delay, following an earlier order of remand of the tribunal. On these two counts, the high court interfered with the punishment of dismissal imposed on the respondent and directed reinstatement with full back wages and consequential benefits. In such cases, the larger concern remains if at all the failure of natural justice was dealt with by the disciplinary authority. Meaning there ought to be proper inquiry made to the question of prejudice. For example non availability of a particular document on the record do not make any difference to the charge of misconduct once it was established by other materials which were available on the record.In this regard, the apex court from the perusal of facts came to the conclusion that since the misconduct was proved, the high court was in error in interfering with the exercise of the disciplinary jurisdiction of the appellants. Besides, the high court was in error in setting aside the punishment and ordering reinstatement with back wages and continuity of service.

On another occasion the apex court in *Digi Cable Network (India) Pvt. Ltd.*v. *Union of India*,[33] held that in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases, it is the duty of the court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Interestingly the court opined that "once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party."[34]

Bias

There is a new form of bias emerging over the years *i.e.,* bias on account of obstinacy. This form of bias has a potential of bringing serious repercussions to the method of judicial process. It guides unreasonable and unwavering persistence to its obscure conclusion. One such possible situation arises in *Indore Development Authority* v. *Manohar Lal*,[35] wherein a preliminary objection for recusal of the judge was sought

32 2019 (17) SCALE 548.

33 AIR 2019 SC 455.

34 *Id*., para 17.

35 AIR 2019 SC 5482.

on the ground that constitution bench consists of the judge who was on a smaller panel. The apex court is of the opinion that:[36]

> … a judge rendering a judgment on a question of law would not be a bar to her or his participation if in a larger Bench if that view is referred for reconsideration. The previous judgment cannot constitute bias, or a pre- disposition, nor can it seem to be such, so as to raise a reasonable apprehension of bias. Nor can expressions through a judgment (based on the outcome of arguments in an adversarial process) be a "subject matter" bias on the merits of a norm or legal principle, or provisions.

Thereafter, the court is of the view that "accepting the plea of recusal would sound a death knell to the independent system of justice delivery where litigants would dictate participation of judges of their liking in particular cases or causes."[37] Holding the lengthy arguments for recusal as embarrassment, the apex court held that "recusal is not to be forced by any litigant to choose a Bench. It is for the Judge to decide to recuse."[38]

Of course, recusal at the asking of the litigating party cannot be countenanced unless it deserves due consideration and is justified. However, it must never be forgotten that an impartial judge is the quintessence for a fair trial and one should not hesitate to recuse if there are just and reasonable grounds.[39] Having said this, peculiar situation do also emerge wherein the petitioner approaches different forums for overlapping issues, and before each forum the demand appears to be either submission of additional documents or recusal of judge or amicus curie.[40]

On another occasion the apex court from the perusal of cases laws and relevant material on record held that it is generally not open for the courts to interfere in matters concerning assessment made by the selection committee, except in cases where the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness.[41] Similarly in *Baidyanath Yadav* v. *Aditya Narayan Roy*,[42] it was alleged that due to undue influence on committee members no proper assessment was made. The apex court observed that in the absence of any allegation of *mala fides* or bias no case of acting in arbitrary manner as against state screening committee was made.The court also pointed out that "there is no requirement mandating the disclosure of reasons in the relevant rules, regulations and guidelines, therefore the procedure adopted by the state screening committee cannot be faulted."[43]

36 *Id*., para 43.

37 *Ibid*.

38 *Id*., para 53.

39 *See Supreme Court Advocates-On-Record Association* v. *Union of India* (2016) 5 SCC 808.

40 *Seema Sapra* v. *Court On Its Own Motion*, AIR 2019 SC 4020.

41 *Union Public Service Commission* v. *Jawahar Santhkumar* 2019 (16) SCALE 573.

42 2019 (17) SCALE 520.

43 *Id*., para 9.3.

Departmental inquiry

The control of the high court over subordinate courts is beyond doubt. The high courts in India are vested with the power to see that the high traditions and standards of the judiciary are maintained by the selection of proper persons to run the district judiciary. If a person is found not worthy to be a member of the judicial service or it is found that he has committed a misconduct he could be removed from the service by following the procedure laid down. This position *interalia* also secures the independence of the judiciary from the executive; besides italso deals with the scope of separation of power of the three wings of the state.

In *Hari Niwas Gupta* v. *State of Bihar*,[44] three different appeals were made against the dismissal order of the judicial officers. In this case the High Court of Patna on the basis of published news item constituted a standing committee which called for a detailed report from district and session judge. On the finding the standing committee resolved that the judicial officers should be placed under suspension and they should be dismissed from service without an inquiry in exercise of power under clause (b) of the second proviso to article 311(2) of the Constitution of India, read-with Rules 14 and 20 of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005. While dispensing with the disciplinary proceedings, the full court of the judges of the high court accepted the recommendation of the standing committee and the same was later accepted by the state government. The order was challenged, primarily on the ground that the full court had contravened clause (b) of the second proviso to article 311(2) of the Constitution by not recording reasons for dispensing with the disciplinary inquiry at the time of recommending dismissal of the judicial officers. The apex court on the perusal of relevant constitutional provisions opined that "control is useless if it is not accompanied by disciplinary powers."[45] Therefore, the power conferred under articles 233-235 read with article 311(2) of the Indian Constitution could also be exercised by the high court (other than the governor alone).[46]

Doctrine of necessity

Wherever in the facts and circumstances of the case, it is absolutely inevitable for a person to exercise another right available to it under the statute and where it is unable to exercise the preliminary right of appeal because of non-existence or non-proper constitution of the appellate authority and for its effective and efficacious exercise of right, it becomes necessary for the appellant to invoke another remedy, then the same needs to be permitted unless it was so specifically barred by law governing the subject and the rights of the parties.The law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety.[47] It is often invoked in cases of bias where there is no

44 2019 (15) SCALE 515.

45 Quoting from *State of West Bengal* v. *Nripendra Nath Bagchi*, AIR 1966 SC 447 at para 14.

46 As opined in *Ajit Kumar* v. *State of Jharkhand* (2011) 11 SCC 458.

47 *Election Commission of India* v. *Subramaniam Swamy* (1996) 4 SCC 104.

other authority or judge to decide the issue. If the doctrine is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit there from.

Having said this, the doctrine could not be imported to maintain a leapfrog appeal. The apex court in *Tamil Nadu Pollution Control Board* v. *Sterlite Industries (I) Ltd.*,[48] opined that the use of doctrine of necessity when an appellate authority under the Act is not properly constituted is a wrong approach. While holding against the approach adopted by National Green Tribunal (NGT), the apex court maintained that "if an appellate authority is either not yet constituted, or not properly constituted, a leapfrog appeal to the NGT cannot be countenanced."[49]

V PROPORTIONALITY

The proportionality test is applied by the court as a primary reviewing authority in cases where there is a violation of articles 19 and 21 of the Constitution. The court is entitled to ask the state to justify the policy and whether there was an imminent need for restricting the fundamental rights of the claimants. The proportionality test can also be applied by the court in reviewing a decision where the challenge to administrative action is on the ground that it was discriminatory and, therefore, violative of article 14 of the Constitution. It was clarified that the principles of wednesbury have to be followed when an administrative action is challenged as being arbitrary and therefore violative of article 14. In such a case, the court would be doing a secondary review. In secondary review, the court shows deference to the decision of the executive.

Proportionality involves two test one is balancing test and the other necessity test.[50]The balancing test permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, while the necessity test requires infringement of human rights to be through the least restrictive alternatives.[51] In *Kerala State Beverages (M and M) Corporation Limited* v. *P.P. Suresh*,[52] the court added another dimension and opined that an administrative decision can be said to be proportionate if:[53]

48 AIR 2019 SC 1074.

49 *Id*., para 55.

50 *Coimbatore District Central Co-operative Bank* v. *Coimbatore District Central Cooperative Bank Employees Association* (2007) 4 SCC 669.

51 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press, Cambridge, 2012). It is worthy to quote here *HRH Prince of Wales* v. *Associated Newspapers Ltd.*, [2006] EWHA Civ 1776, wherein the court is of the view that the application of the proportionality test is more straightforward when only one Convention right is in play, meaning where the question is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. However, it is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it.

52 AIR 2019 SC 5222.

53 *Id*., para 29.

(a) The objective with which a decision is made to curtail fundamental rights is important;

(b) The measures taken to achieve the objective have a rational connection with the objective; and

(c) The means that impair the rights of individuals are no more than necessary.

VI JUDICIAL REVIEW

In *Yashwant Sinha* v. *Central Bureau of Investigation*,[54] the apex court while rejecting the review applications pertaining to the details/cost as also against any advantage, which may have accrued on the account of procurement of the 36 Rafale fighter jets opined that the petitioners decision to invoke the jurisdiction under article 32 of the Indian Constitution cannot be permitted to have"an adjudication process which is really different from what is envisaged under the provisions invoked by them."[55] In fact the court opined that "the extent of permissible judicial review in matters of contract, procurement, etc. would vary with the subject matter of the contract and that there cannot be a uniform standard of depth of judicial review which could be understood as ab across the board principle to apply to all cases of award of work or procurement of goods/material."[56] The apex court even opined that "perception of individuals cannot be the basis of a fishing and roving enquiry by this court, especially in such matters."[57]

Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*. However, when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. The apex court had earlier expressed that:[58]

> A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power

54 2019 (16) SCALE 1.

55 *Id*., para 19.

56 *Id*., para 12. In this regard, it will be worth to quote *Tata Cellular* v. *Union of India* (1994) 6 SCC 651 wherein the court held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism.

57 *Id*., para 34.

58 *Jagdish Mandal* v. *State of Orissa* (2007) 14 SCC 517 at para 22.

> of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.

Further, it is well understood principle that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the court to express any opinion on the exercise of the legislative prerogative in this regard.[59] This was rightly considered by the apex court in *Ashwani Kumar* v. *Union of India*,[60] wherein it opined that directions cannot be given to the executive to ratify the United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was signed by India in 1997 but yet not ratified. The court acknowledged that "we do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not 'possess', while exercising power of judicial review."[61]

Maintainability of review petition

Explaining the maintainability of review petitions the apex court in *Kantaru Rajeevaru* v. *Indian Young Lawyers Association*,[62] made it clear as to when a review is maintainable[63] and when not.[64] While rejecting the review petitions, the court held that the Constitution places a non-negotiable obligation on all authorities to enforce the judgments of this court. To this extent, the court opines thus:[65]

59 *See* David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016).

60 2019 (12) SCALE 125.

61 *Id*., para 33.

62 2019 (15) SCALE 580.

63 When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the Petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason. *Id*. at para 20.1

64 When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived. *Id*. at para 20.2

65 *Id*., para 75.

> These remedies within a rule of law framework provide recourse to all those who may be and are affected by the course of a judicial decision. When the process is complete and a decision is pronounced, it is the decision of the Supreme Court and binds everyone.

Thereafter, the apex court direct the State of Kerala to give wide publicity to the judgment through the medium of television, newspapers, *etc.* and make necessary steps to secure the confidence of the community in order to ensure the fulfillment of constitutional values.

Similarly, in *Shrimanth Balasaheb Patil* v. *Hon'ble Speaker, Karnataka Legislative Assembly*,[66] the issue was pertaining to the maintainability of writ petition for challenging the order of disqualification by the speaker, the apex court emphasized on its earlier decision delivered by the constitutional bench in the case of *KihotoHollohan* v. *Zachillhu*,[67] wherein it was held that the order of the speaker under 10th Schedule to the Constitution can be subject to judicial review on the basis of *mala fide*, perversity, violation of the constitutional mandate and order passed in violation of natural justice. In the present case, the court noted that the speaker, while exercising the power to disqualify the petitioners acts as a tribunal and therefore the legality or validity of such orders are amenable to judicial review. Moreover, the court also dealt with the constitutional validity of speaker's discretion to order disqualification and rejecting resignation of the petitioner.The court held that speaker's scope of inquiry pertaining to acceptance or rejection of a resignation submitted by a member of legislature is limited to the extent of its genuineness or voluntariness and therefore once a member is willing to resign voluntarily. The speaker has no other option but to accept the resignation, also it is constitutionally impermissible for the speaker to take into consideration any irrelevant factors while considering their resignation and hence such a satisfaction of speaker is open for judicial review.

In *Yashwant Sinha* v. *Central Bureau of Investigation*,[68] a preliminary objection pertaining to the maintainability of review petition was raised by the attorney general on the behalf of the respondents.It was contended that the review petition lacked in *bona fides* and should not place on record as evidence as the documents were illegally procured from the office of the Ministry of Defense, Government of India. Also, the documents so procured and published in different editions of "The Hindu Newspaper" are critical to national security and therefore violates sections 3 and 5 of the Official Secrets Act, 1923 (Act, 1923). Further, it was contended that such disclosure would affect the sovereignty and integrity of the nation and, therefore, cannot be accessed under section 8(1) (a) the Right to Information Act, 2005 (Act, 2005). It was also contended that rely upon such document would violate section 123 of the Indian Evidence Act, 1872 (Act, 1872) as it prohibits anyone from giving evidence derived from unpublished official records relating to any affairs of the state except with permission of the department head.

66 (2020) 2 SCC 595.
67 AIR 1993 SC412.
68 AIR 2019 SC 1802.

The apex court while rejecting such contentions held that the freedom of press is imperative for the continued existence of a vibrant democracy and, therefore, right to publish these documents by the press falls within their right to freedom of speech and expression and is not restricted under any grounds mentioned in article 19(2) of the Indian Constitution.The court observed that there is no such provision in the Act, 1923 or in any other statute which prohibits publication of such secret documents or presenting such documents before a court of law. The court also held that public authority would be justified in permitting access to information if public interest in disclosure outweighs the harm sought to be avoided by protecting documents under the Act, 1923 or under section 8(1) (a) of Act, 2005.The court infact pointed out that these documents are already in public domain and therefore no public interest would be served by restricting their further disclosure under section 8(1)(a) of the Act, 2005. Finally, the court rejected the contention that these documents are privileged documents that cannot be placed on record as evidence assection 123 of the Act, 1872 applies to unpublished documents only.In the present case these documents were already in public domain and, therefore, the court is not barred from considering them as a piece of evidence.The court even stressed upon the case of *S.P. Gupta* v. *Union of India*,[69] which opined that such unpublished document can be permitted to be placed on the record as a piece of evidence if such a disclosure does not undermine public interest. The court in essence held that judicial review is recognized as a basic feature of the Indian Constitution and ability to secure evidence thus forms the most important aspect in ensuring the triumph of truth and justice.

Judicial review of administrative action

With the purpose of promoting rule of law, the courts through judicial review may declared any administrative ultra vires action to be unconstitutional. It protects individuals and prevent abuse of power exercised by those administrative bodies and thereby provide suitable remedies available to them constitutionally. In *Municipal Council, Neemuch* v. *Mahadeo Real Estate*,[70] the appellant had invited tenders for allotment of land on lease, this was done without prior approval of the state government as in required under section 109 of the Madhya Pradesh Municipality Act, 1961, the notice of inviting tender was published in two Hindi newspaper, since the respondent no.1 had made the highest bid it was accepted by the appellant. However, objection was raised by two municipal counsellors before the collector pertaining to the tender process. The collector stayed the further proceedings and, thereafter, directed the municipal council to take permission from the state government. On December 21, 2009 the state government directed respondent no.3 to hand over the possession to respondent no.1, however, while doing so it also directed the directed the respondent no.3 to inspect as to whether the land was being put for use as per the development plan. The respondent no.3 made a communication to the state government on March 3, 10 and thereby specifically pointed out that there was no proper publication of the said tender and rates were not competitive as per the market value, also he observed

69 AIR 1982 SC 149.

70 AIR 2019 SC 4517.

that there was a cartel among the tenderers. The state government re-examined the reconsider the issue and then authorizes respondent no.3 to take appropriate action, the respondent no.3, thereafter, gave orders for initiation of proceedings afresh. The respondent no.1 filed writ petition before the division bench of high court allowed the writ petition of respondent no.1 and thereby quashed and set aside the order passed by respondent no. 3 on the ground that the state government had granted its approval for the allotment of the land on lease in favour of respondent no.1 on December 21, 2009. Thereafter, the appellant filed review petition before the high court which was rejected. The Supreme Court in the present case held that principle of self-restraint needs to be adopted in examining an administrative action, the court observes that:[71]

> The scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion, that the decision maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of "Wednesbury Unreasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision making process. It is also equally well settled, that it is not permissible for the court to examine the validity of the decision but this court can examine only the correctness of the decision-making process.

Further, in order to examine the reasonableness of an order of the authorities, the apex court opined thus:[72]

> It could thus be seen that an interference by the High Court would be warranted only when the decision impugned is vitiated by an apparent error of law i.e. when the error is apparent on the face of the record and is self-evident. Or when the decision impugned is so arbitrary and capricious that no reasonable person would have ever arrived at. The test is not what the court considers reasonable or unreasonable but a decision which the court thinks that no reasonable person would have taken. Not only must this but such a decision has led to manifest injustice.

The apex court opined that the high court's observation that the action of the commissioner is arbitrary and favoritism is neither legally or factually correct. Further, it observes that the divisional bench has totally ignored the subsequent correspondence that took place between the state government and respondent no.3 after December 21, 2009 wherein the state government, after the respondent no.3 pointing out irregularities to its notice had re-examined and reconsidered the issue and, thereafter, permitted the respondent no.3 to pass appropriate orders including invalidating the tender process and to initiate fresh tender process. Moreover, it also observes that the state government and respondent no.3 acted in larger public interest by directing re-

71 *Id*. at para 15.

72 *Id*., para 17.

tendering and inviting fresh tender by publishing it at national level. Finally, it held that the high court, while exercising its powers of judicial review of administrative action, could not have interfered with the decision unless the decision suffers from the vice of illegality, irrationality or procedural impropriety.

Writ of mandamus

The apex court in *Indibility Creative Pvt. Ltd.* v. *Government of West Bengal*,[73] issued writ of *mandamus* restraining the state from taking recourse to any form of extra constitutional means to prevent the lawful screening of the feature film *Bhobishyoter Bhoot*, and asked the state authorities to ensure that the properties of the theatre owners who exhibit the film are duly protected as are the viewers against attempts on their safety. The court referred to the text of the earlier judgment made in *S. Rangarajan* v. *P. Jagjivan Ram*,[74] which runs thus:[75]

> …If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation.

Perhaps, it is high time to understand that pluralism is the soul of democracy. Freedom of speech has no meaning if there is no freedom after speech.[76] The reality of democracy is to be measured by the extent of freedom and accommodation it extends.[77] The role of state is significant here, precisely on two counts. *Firstly*, to ensure that the law and order situation does not go out of hand, and *secondly* to ensure its presence particularly as against anyone who seeks to take the law and order in his own hand at the cost of the person who has peacefully expressed his/her view.

Writ of certiorari

The jurisdiction to issue writ of certiorari is supervisory and not appellate. The writ of certiorari is intended to correct jurisdictional excesses. Once a decision is rendered by a body amenable to certiorari jurisdiction, certiorari could be issued when a jurisdictional error is clearly established. In *General Manager, Electrical Rengali Hydro Electric Project, Orissa* v. *Giridhari Sahu*,[78] the applicants alleged that they had signed certain papers, thinking of regularization but as it turned out, it was used as if they were claiming the benefit of a Voluntary Separation Scheme (VSS). Alleging deception practiced, an application was filed under section 33A of the Industrial Disputes Act, 1947 by the 90 workers. The labour court found that the VSS was thrust upon the applicants and there was no publicity and allowed the application and directed

73 AIR 2019 SC 1918.

74 (1989) 2 SCC 574.

75 *Ibid*.

76 Nigel Warburton, *Free Speech: A Very Short Introduction* 27 (Oxford University Press, Oxford, 2009).

77 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* 183 (Oxford University Press, New Delhi, 2016).

78 (2019) 10 SCC 695.

reinstatement with 70 per cent back-wages which was directed to be adjusted towards payments made to the applicants. The high court held that the workers had worked continuously for a period of five years on the date of the judgment, and are therefore entitled for regularization. From the careful perusal of facts, the apex court found that the labour court had overlooked the evidence in the form of the applications duly made by the applicants claiming benefit of the VSS. The court viewed that the material that was placed before the tribunal was not considered or discussed and that there was no adjudication by the tribunal. The apex court set aside the award on the ground of non-application of mind by the tribunal to the material on record. The court further opined that in the case of writ of *certiorari,* it is not axiomatic or that upon a finding of illegality, the court is bound to interfere, it can still exercise its discretion and decline jurisdiction unless there is manifest injustice.

VII TRIBUNALS

Presently, there is a desperate need to overcome the hurdles of delay in the administration of justice. Creation of tribunals has evolved as one solution in the ever-constant strive to increase access to justice. However, tribunal proliferation has failed the test of public confidence due to purported lack of competence, objectivity and consistent judicial approach.[79] The apex court had acknowledged the sad state of tribunals.[80] In fact one important direction issued by the apex court was the constitution of an umbrella organization that will address the drawbacks of the tribunal system.[81]In *Rojer Mathew* v. *South Indian Bank Ltd.*[82], broadly petitioners have questioned the validity of Part XIV read with the Eight and Ninth Schedules of the Finance Act 2017, as being ex-facie unconstitutional, arbitrary, in colourable exercise of legislative power, and offensive to the basic structure of the Constitution. The apex court on the perusal of various constitutional provisions opined that "Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The rules which have been framed pursuant of the rule making power under Section 184 are held to be unconstitutional."[83] Interestingly, thereafter the court opines that "since during the pendency of these proceedings, certain steps were taken in pursuance of the interim orders and appointments have been made, we direct that those appointments shall not be affected by the declaration of unconstitutionality."[84] The apex court also dwelled onto the serious issue of lack of an authority that can ensure competence and uniform service conditions to a fragmented tribunal system.[85] To this concern the court recommended (of course through legislative intervention) for the constitution of an

79 Arun K Thiruvengadam, "Tribunals", in Sujit Choudhry *et al* (eds.), *The Oxford Handbook of the Indian Constitution* 412-31 (Oxford University Press, New York, 2016).

80 *SeeL. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261.

81 *Id*. at para 96.

82 2019 (15) SCALE 615.

83 *Id*., para 334.

84 *Ibid*.

85 *Id*., para 335.

independent statutory body *i.e*., "National Tribunals Commission",[86] to oversee the selection process of members, criteria for appointment, salaries and allowances, introduction of common eligibility criteria, for removal of chairpersons and members as also for meeting the requirement of infrastructural and financial resources.

In *All India Institute of Medical Sciences* v. *Sanjiv Chaturvedi*,[87] the larger issue was: can the Chairman of Central Administrative Tribunal (CAT), sitting singly to decide on application for transfer under section 25 of the Administrative Tribunals Act, 1985 (Act, 1985), can stay the proceeding before a two-member Bench or interfere with the orders of a two-member bench. The apex court opined that the Chairman, acting judicially, is equal to any other member, therefore, especially on the reading section 25 of the Act, 1985,[88] the chairman, being one amongst equals, could not have stayed proceedings pending before a larger bench.

In *Shiur Sakhar Karkhana Pvt. Ltd.* v. *State Bank of India*,[89] the respondent was placed *ex parte* before the state commission for failing to appear before it despite service of notice. Subsequently, an application was filed by the respondent to set aside the order, which was dismissed by the state commission on the ground that it does not have jurisdiction to recall its own prior order. The respondent approached the high court by filing a writ petition, which set aside the order of the state commission. A contention was raised before the high court that an alternative and efficacious remedy was available to the respondent in the form of an appeal before the National Consumer Disputes Redressal Commission under section 21 of the Consumer Protection Act, 1986 (Act, 1986). The high court concluded that an appeal may not lie before the National Commission and consequently there was no alternative remedy available to the respondent. The apex court while disagreeing with the view adopted by the high court opined that "a plain reading of section 21(a)(ii) read with section 19 of the Act, 1986 makes it clear that the National Commission has jurisdiction to entertain appeals against the orders passed by the State Commission."[90] It is pertinent to explain the correct legal position here. The presence of an alternative and efficacious remedy is not an absolute bar on the jurisdiction of the high court under article 226 of the Constitution, and is a rule of discretion and self-imposed limitation rather than that of law. However, entertaining a writ petition in such a case may be proper in certain circumstances, for instance when an order has been passed in total violation of the principles of natural justice, or has been passed invoking repealed provisions

86 *Id*., para 336. In this regard, it will be desirable to mention that in *Union of India* v. *Rahul Gandhi* (2010) 11 SCC 1 and *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261, the Ministry of Law & Justice, Government of India was ordered to take over the administration of all tribunals created by Parliament and streamline the functioning of the same. In fact, this aspect was referred in *Madras Bar Association* v. *Union of India*, (2014) 10 SCC 1.

87 AIR 2019 SC 2971.

88 *See Morgan Stanley Mutual Fund* v. *Kartick Das* (1994) 4 SCC 225.

89 MANU/SC/1873/2019.

90 *Id*., para 6.

No entertainment of writ petition for mere issuance of show cause notice

In *Commissioner of Central Excise, Haldia* v. *Krishna Wax (P)Ltd.*,[91] an appeal was made under section 35L of the Central Excise Act, 1944 (Act, 1944) arising out of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata. The respondent had not registered itself and was not paying any excise duty on the products that it was manufacturing. The search conducted by the department at the registered office and the factory premises of the respondent led to the recovery of certain material on the basis of which the department initiated the proceeding. Thereafter, a writ petition was filed in which an order was passed by the high court directing the appellant to decide whether the department had jurisdiction to proceed.On the basis of direction issued by the high court, the department in deference to such direction did consider the matter and by an internal order a recorded an opinion that the authorities under the Act, 1944 had jurisdiction to proceed in the matter. The apex court explained the legal position and opined that "merely because the Internal Order was communicated to the respondent, it would not afford the respondent a cause of action to file an appeal against said internal order. The communication of said Internal Order was only in obedience of the directions issued by the high court. It was not a decision or determination which was arrived at in terms of sub-section 10 of Section 11A of the Act, 1944." In fact, as a matter of practice writ petitions are normally not entertained as against the mere issuance of show cause notice.[92] In the present case, no show cause notice was issued when the high court had initially entertained the petition and directed the department to *prima facie* consider whether there was material to proceed with the matter.

VIII RIGHT TO INFORMATION

Modern constitutional democracies emphasize upon citizen's right to freedom of information, particularly with regard to the affairs of the government.[93] In *Central Public Information Officer* v. *Subhash Chandra Agarwal*,[94] there were appeals preferred by the Central Public Information Officer (CPIO), Supreme Court of India, and Secretary General, Supreme Court of India, against the common respondent and seeks to answer the question under the Right to Information Act, 2005 (Act, 2005) in the context of collegium system for appointment and elevation of judges to the Supreme Court and the high courts; declaration of assets by judges, *etc*.The apex court was required to answer three substantial question of law, namely: [95]

> i. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought?

91 2019 (16) SCALE 710.

92 *Malladi Drugs and Pharma Ltd.* v. *Union of India* 2004 (166) ELT 153 (SC).

93 Alberto Alemanno: "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection", in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, Oxford, 2015).

94 2019 (16) SCALE 40.

95 *Id*., para 252.

> Whether the information sought for amounts to interference in the functioning of the Judiciary?
>
> ii. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
>
> iii. Whether the information sought for is exempt under Section 8(1)(j) of the Act, 2005?The apex court opined that the contents of the declaration of assets would fall within the meaning of "personal information" and the test set out under clause (j) of clause (1) of Section 8 would be applicable along with the procedure under Section 11 of the Act, 2005. The apex court thereafter argued that "the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm."

There will be little doubt that the Act, 2005 has empowered citizens. However, there are quite a few occasions wherein the use of provisions of the Act, 2005 are made against the very intent and purpose for which it was made. For example, the provisions are used to pressurize the government to expediate shortlisting and selection process.[96] On other occasion, the use of provision of the Act, 2005 is made to deny critical information, so much so as against the directions of the apex court.[97] Here one needs to understand that the Act, 2005 not only sub-serves and ensure freedom of speech, but on proper implementation, it has the potential to bring about good governance which is an integral part of any vibrant democracy.

There are concerns over the proper implementation and the same was addressed in *Anjali Bhardwaj* v. *Union of India*,[98] wherein a petition was filed based on the report published in March, 2018 titled "Report Card on the Performance of Information Commissions in India". The said report found that eight information commissions had a waiting time of more than one year for an appeal/complaint to be heard, which was calculated on the basis of the number of appeals and complaints pending as on October 31, 2017 and the monthly disposal rate. Further, it revealed that several information commissioners undermine the autonomy of the commission, which hampers its smooth functioning including its ability to comply with the directions of the Supreme Court regarding the power of the chief information commissioner to decide formation of special benches to hear matters involving complex questions of law. The petition also alleged that there is a lack of transparency in the appointment of information commissioners inasmuch as both the Central Government as well as

96 *See Common Cause* v. *Union of India* 2019 (3) SCALE 678. In this case during the pendency of writ application the regular director was appointed.

97 *See Girish Mittal* v. *Parvati V. Sundaram* 2019 (6) SCALE 804. The apex court found that the concerned authorities who are continuing to violate the directions, are given last opportunity to withdraw the disclosure policy insofar as it contains exemptions which are contrary to the directions issued by the apex court.

98 2019 (3) SCALE 447.

various state governments have failed to adopt proper procedure to ensure transparency in the shortlisting, selection and appointment of information commissioners. As a result of such a lackluster approach, several cases have been filed in various courts challenging such appointments. On careful examination of ground realties, the apex court placed five general directions to ensure effective implementation of the Act, 2005.

In *High Court of Tripura Through the Registrar General* v. *Tirtha Sarathi Mukherjee,*[99] a writ petition was filed challenging the results and seeking revaluation.The court on the perusal of facts noted that the writ petition came to be dismissed in the year 2012 by the high court. Thereafter a special leave petition was dismissed in the year 2013, and the review petition was filed after five years. Also, there were supervening development in the form of fresh selection. Taking note of these developments the court while dismissing the review petition opined that while the delay in filing the review petition could be condoned (on rare and exceptional occasions), but it does not mean that the court where it exercises its discretionary jurisdiction under article 226 of the Indian Constitution remains oblivious to the subsequent development and the impact of passage of time.

IX LEGITIMATE EXPECTATION

Power vested by the state in a public authority ought to be viewed as a trust coupled with duty to be exercised in larger public or social interest. Therefore, the power so exercised must strictly adhere to the statutory provisions or fact situation of a case. A decision taken in an arbitrary manner contradicts the principle of legitimate expectations. The authority is under legal obligation to exercise the power reasonably and in good faith to effectuate he purpose for which power stood conferred. In *State of Bihar* v. *Sachindra Narayan*,[100]an appeal was directed against an order passed by the division bench of the High Court of Patna whereby the writ petition was allowed directing the appellant to provide financial assistance for payment of the arrears as well as current pension to the employees of the Anugraha Narayan Sinha Institute of Social Studies, Patna (Institute). The apex court while referring to the earlier judgment,[101]examined the concept of doctrine of legitimate expectation and opined thus:[102]

99 AIR 2019 SC 3070.

100 AIR 2019 SC 705.

101 *Union of India* v. *Hindustan Development Corporation* (1993) 3 SCC 499. The court opined thus:

> …legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. *Id*., para 33.
>
> Thereafter the court held thus:
>
> legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. *Id*. at para 35.

102 *Supra* note 100 at para 22.

> …legitimate expectation is one of the grounds of judicial review but unless a legal obligation exists, there cannot be any legitimate expectation. The legitimate expectation is not a wish or a desire or a hope, therefore, it cannot be claimed or demanded as a right. The payment of pension in the past will not confer an enforceable right in favour of the Institute or its employees.

X CONCLUSION

During the year under survey a number of important cases have been decided. Author would like to draw attention on two important developments. *Firstly*, it was rightly argued that the judge must not sit in appeal to adjudge his judgment.The reason been thatthe jurisdictions are primarily corrective jurisdictions under the hierarchal system, and professional as well as institutional integrity demands that the same person should not be a judge at both levels. Also, the judge who has decided the matter may be pre-disposed to support the previous reasoning and, in that case, he is or she is a judge in his or her own cause. For these reasons, the judge has to step down, in case he/she cannot impart justice impartially. The judge or judges concerned should excuse themselves and abstain from sitting in the case. A judge ought not to hear an appeal against his/her own decisions. And *Secondly*, competence, professionalism and specialization are indispensable facets of a robust tribunal system designed to deliver specialized justice. Perhaps, there is a greater need for a better comprehending of principles of administrative law. It is the study of pathology of power especially in a developing society. It is a means through which development of new principles and rules are madeto ensure a close nexus between law and life of the people. Perhaps, tothese extents, the surveyed year made us ponder whether power had been accountable, governance had been progressively just, and state acted ethical!!